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BEIS CONSULTATION - GOOD WORK PLAN: ESTABLISHING A NEW SINGLE ENFORCEMENT BODY FOR EMPLOYMENT RIGHTS

RESPONSE FROM EMPLOYMENT LAWYERS ASSOCIATION

6 OCTOBER 2019

Introduction

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. The ELA's Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation.

A sub-committee, co-chaired by David Widdowson and Catrina Smith was set up by the Legislative and Policy Committee of ELA to respond to the consultation document issued by the Department for Business, Energy and Industrial Strategy "Good Work Plan: establishing a new Single Enforcement Body for employment rights".

There are some questions which we have not answered mainly because they are directed at employers and/or employees or concern purely policy issues. We have concentrated our response on the areas of legal relevance.

Question 1: Is the current system effective in enforcing the rights of vulnerable workers?

Under the current system, the majority of employment rights are enforced by the individual or a group of individuals through an Employment Tribunal.

In addition to the Employment Tribunal system, a number of enforcement bodies also seek to enforce the rights of vulnerable workers. These enforcement bodies include: HMRC; the Gangmasters and Labour Abuse Authority; the Employment Agency Standards Inspectorate; the Health and Safety Executive; and the Equality and Human Rights Commission.

For the purpose of responding to this question we have focused on the role of the Employment Tribunal system, the Gangmasters and Labour Abuse Authority, the Employment Agency Standards Inspectorate and HMRC (particularly in relation to enforcement of National Minimum/National Living Wage and enforcement of holiday pay).

We would expect that some of the most vulnerable workers in the UK may be recent arrivals. We note that the current edition of the "Life in the UK" booklet does not contain a section on basic employment rights and how to enforce them. We would suggest that this would be a good method of widening public knowledge of employment rights.

The role of the Employment Tribunal System

The current Employment Tribunal system is reliant on individuals (or in some cases, representative bodies such as trade unions and employee representative bodies) being aware of their statutory rights and taking legal action as a result of an alleged breach. Whilst legal representation is not mandatory, it is common. While the original aims of the Tribunal system

were to provide a quick and low cost resolution of workplace disputes, without the need for lawyers, most cases now involve lawyers on one or both sides. The Tribunal process is seen by some as costly and complex.

The Tribunal system was also established in an era in which many individual employment rights would be "enforced" by trade unions who would take up issues on behalf of their members. The decline in trade union membership and the focus of works councils (at a local, national and European level) tends to be on issues which affect a number of employees. As result, employees may feel that the only way in which to resolve their disputes is via the Tribunal system.

We are concerned that a lack of awareness regarding basic entitlements and, in some cases, the difficulty in finding a cost effective way to pursue an employer to ensure such entitlements are received may prevent workers from formally challenging malpractices, particularly those workers who are performing low paid and low skilled tasks.

Fear of "victimisation" (not necessarily falling within the strict legal definition) is also a concern for many workers, who may therefore be discouraged from raising issues regarding their entitlements. As a consequence, most Tribunal claims are made by employees or workers who have left employment rather than as a means of addressing "live" workplace issues. In that regard, the potential for anonymity by going through a government enforcement body may be attractive.

Finally, enforcement of these rights is not a straightforward process and our understanding is that individuals will often not know whether such complaints should be made to government authorities or through the Employment Tribunal. This may act as a barrier to workers seeking to enforce their rights.

Gangmasters and Labour Abuse Authority and the Employment Agency Standards Inspectorate (EAS)

These two agencies are seen to have been particularly effective in enforcing the rights of vulnerable workers that fall within their remit.

However, as we will touch on later, the lack of information sharing either between or with these organisations, together with the problems listed at pages 12 and 13 of the consultation documentation, are likely to continue to hinder efforts to enforce the rights of vulnerable workers.

Expanding the scope of the EAS to regulate certain activities of umbrella companies (a prevalent business model) should help raise standards amongst umbrella companies, provided the EAS is able to have a similar impact as in its current scope.

We are also concerned that a lack of awareness of the existence of these bodies and their remit may inhibit their ability to be effective in their role.

Enforcement of National Minimum/National Living Wage

The recent reforms to National Minimum/National Living Wage enforcement (including an increase in the maximum penalty for non-compliance and the introduction of more robust labour market enforcement measures) are likely to place considerably more pressure on employers to comply with these obligations.

Taking a proactive and more targeted approach to enforcement in high risk areas, particularly where there has been a historic pattern of failures to pay the National Living/National Minimum Wage may well lead to the discovery of other areas of non-compliance.

However, the effectiveness of such measures will depend on the number of prosecutions in cases of continued non-compliance. Historically, we understand that such prosecutions have been few and far between and low numbers of prosecutions may result in the deterrence value being diminished.

Enforcement of holiday pay

State enforcement has now been extended to the underpayment of holiday pay. Workers are now able to enforce their rights to holiday pay by either contacting HMRC or bringing an Employment Tribunal claim. This reflects the enforcement approach that already applied to underpayment of the National Minimum Wage, as well as the financial penalties that are issued in the event of successful complaints. The extension of state enforcement may well ease some of the volume pressure on Employment Tribunals and encourage employees to pursue their rights to holiday pay.

One of the biggest issues regarding the payment of holiday pay is a lack of education regarding basic entitlements. The awareness campaign (launched in late February 2019) including real life examples to support the interpretation and understanding of the holiday pay rules, targeted at both individuals and employers, is a positive step in helping to ensure that all workers are benefiting from their entitlement to paid annual leave.

However, we acknowledge that holiday pay is a complex area of the law which has resulted in frequent intervention by the higher courts both in the UK and Europe. In many of the cases where the courts have found against employers who were genuinely unaware that their (or their adviser's) interpretation of the law was incorrect.

Question 2: Would a single enforcement body be more effective than the current system?

There are pros and cons of such an approach which we address at questions 3 and 4 (below).

Question 3: What do you think would be the benefits, if any, of a single enforcement body?

It is expected that the cost and time spent dealing with a state investigation could be less than that spent defending a claim through the Tribunal system. If one state agency deals solely with this type of complaint, this may streamline the process and make it more efficient if they are dealing with the same issues repeatedly.

Greater efficacy of enforcement could well lead to more concerns being raised, as workers may well be more confident that doing so will lead to a feasible resolution.

We would suggest that an important role of such a body would be to educate workers and employers about employment rights. A single agency is likely to provide a single point of contact for individuals and employers (and as such is likely to benefit from additional powers and resources) including crucially developing centrally accessible materials and guidance to increase awareness of workers' rights for both employers and workers. Making the most vulnerable aware of their basic entitlements (in the form of centrally accessible materials and guidance) should encourage workers to raise concerns.

Having an ombudsman-like authority (as exists in Australia in the form of the Fair Work Ombudsman https://www.fairwork.gov.au/) may encourage workers to bring complaints to light as it may seem less threatening to the worker than going through court proceedings. The "paper process" (as opposed to a face-to-face hearing) may expedite access to justice and should decrease costs involved for all parties. Careful consideration would need to be given to vulnerable workers whose first language is not English and/or who do not have easy internet access.

We would also expect that a single enforcement body would be better able to share information about investigations as in our experience, labour market abuses in one area are often indicators of poor behaviour in other areas, as well

Question 4: What do you think would be the risks, if any, of a single enforcement body?

There is likely to be a substantial period of time required to amalgamate the existing system into a single enforcement body. The resources required to establish such a body could be moved away from the very intention of the organisation which is to protect vulnerable workers. Collaboration and active pooled information sharing between existing organisations may be a viable alternative.

There are also concerns that expertise and specialist skills built up over time in existing organisations could be affected.

Most of the work of the existing bodies is targeted at vulnerable workers, particularly those in certain sections. However, the Equality and Human Rights Commission ("EHRC") has a much wider remit to protect and promote bet practice in respect of all workers – not just those

traditionally seen as “vulnerable”. For example, they have undertaken work into the levels of sexism in the City – which includes some women who are very highly paid and may not traditionally be seen as “vulnerable”. In our view, it would detrimental to enforcement of employment rights generally if, in all areas, the single enforcement body were to take a sectoral approach.

It is possible that employers could face a higher volume of state investigations compared to the number of Tribunal claims brought if employees feel that complaining to a government authority is less intimidating and more accessible than bringing a Tribunal claim. This may mean further management time spent dealing with such investigations. There may also be a greater number of vexatious complaints brought to a state authority rather than to a Tribunal if it is more accessible and potentially “faceless”; so a sifting process may need to be considered before an employer is investigated.

Whilst pooling of information as part of a single enforcement body could well result in greater efficacy of enforcement, clear guidelines and processes would need to be drawn up in relation to data sharing with other external agencies including pensions regulators, the Health and Safety Executive (“HSE”), the UK Border Agency and the Employment Tribunal system.

An option not considered in the Consultation is whether there should be an obligation upon the Employment Tribunal to refer potential and alleged breaches of vulnerable workers’ rights to the appropriate agency (as currently happens, at the individual’s instigation, in whistleblowing cases to the relevant regulator) . If so, at what stage should such a referral be made? There is a balance to strike between sharing that information for the protection of the wider workforce and other vulnerable workers who may be affected, against a backdrop of a large administrative burden which may be increased unnecessarily if such a notification is made too early and a claim or complaint is later found to be unfounded or vexatious.

To be effective, any enforcement body would need to be adequately funded and it may be the case that the savings realised on the infrastructure and administrative side from combining a number of agencies would increase the overall amount of funding available for front line enforcement, which ELA members perceive to be a positive outcome.

Question 5: Do you think the current licencing scheme (for supply or use of labour) should be expanded to other sectors at risk of exploitation by gang masters?

The success of the current licencing scheme suggests that there may be benefits of expanding to include other “at risk” sectors.

It is hoped that the extension of powers for the Gangmasters and Labour Abuse Authority to cover all workers regardless of whether they are engaged through an employment agency or have a direct contractual relationship with an employer, will increase communications between government agencies and improve working conditions for those working in high risk areas of the economy.

One other particular “at risk” area which has received a large amount of media attention over the last few years is the ever developing “gig” economy.

The media has created the impression that workers who perform low skilled and/or low paid tasks are more likely to be taken advantage of by their employers. However, this may not always be the case and much will depend on the culture of a particular business. Recent case law suggests that some businesses operating in and around the gig economy have not classified their workers’ status correctly and those workers are therefore losing out on statutory sick pay (“SSP”) and/or holiday pay.

Ultimately, there is a clear dividing line between those who provide flexible labour as a lifestyle choice and those for whom there is no alternative. Flexible arrangements work well for many, but not for all, especially those considered vulnerable.

Whilst it is not suggested that the current licencing scheme should be expanded to cover the whole of the gig economy, a single enforcement body may be best placed to work together with these emerging business models to clarify issues of employment status and ensure that the rights of vulnerable workers are adequately protected and enforced

Question 6: Are there any at risk sectors which you think enforcement for existing regulations could be strengthened to drive up compliance in place of licensing?

For those individuals who have an alternative working status through necessity rather than choice, the risk of exploitation is likely to be increased. Clarity over and proper application of employment status together with clear guidance/ education should lead to less scope for unscrupulous businesses to misclassify staff to avoid providing basic rights/entitlements such as paid holiday, National Minimum/National Living Wage and pensions.

Question 7: Should a single enforcement body take on the enforcement of statutory sick pay if this process is strengthened?

Enforcement of SSP would seem to be a logical function for a single enforcement body and this would in our view be the case whether or not the proposed DWP reforms result in strengthening of the process. The reported success rate in the current enforcement process managed by HMRC would suggest, however, that there is little need for change in this aspect. The identified problem of awareness of rights is not confined to SSP and could sensibly form part of an advice and guidance function for the single enforcement body.

Question 8: Should a single enforcement body have a role in relation to discrimination and harassment in the workplace?

The EHRC currently has an extensive statutory role in relation to discrimination and harassment and it is difficult to see any good reason to interfere with that. It may well be sensible that a single enforcement body that becomes aware, in the course of exercising its powers and functions, of information that suggests a breach of the Equalities Act 2010 (and

perhaps the Human Rights Act 1998), were able to lay that information before the EHRC to take action but we would suggest that its powers should not go beyond that and should not cut across the EHRC's powers.

Question 9: What role should a single enforcement body play in enforcement of employment Tribunal awards?

In its consultation document in response to the Matthew Taylor Report (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/679792/2018-01-17_Taylor_Employment_Tribunal_Enforcement_Condoc_v7.1_FINAL__1849_.pdf), BEIS reported that 53% of successful claimants in cases before the Employment Tribunal had only received part payment of the award made in their favour and 35% no payment at all. As we stated in our response to that consultation, we regard that as a very surprising and concerning figure and one which indicates a wholly inadequate existing enforcement process. If those statistics are to be reversed (as we would suggest is very necessary) then a significant change in that process is required.

Until 2016 it was left entirely to the individual to bring a claim to enforce the judgment in the County Court or to use the Fast Track system in the High Court, both of which require the claimant to pay a fee. Given the high level of unpaid awards, a penalty system was introduced by which an unpaid claimant could refer the matter to BEIS, who were given the power to impose a penalty on delinquent employers. In 483 cases taken up by BEIS at the point of the consultation document, payment of the judgment award had been secured in only 92 cases; a 19% success rate.

Together, this suggests that the current enforcement system is not effective and we would suggest would be an appropriate function to be exercised by a single enforcement body. On receiving information form an unpaid claimant a single enforcement body could either use the penalty process currently assigned to BEIS or simply bring action itself to recover, with the cost of that being paid by the employer. There should be no charge to the individual and appropriate information and guidance should be available both from it and the Employment Tribunal.

Question 10: Do you believe a new body should have a role in any of the other areas?

The issue of worker status was at the heart of the Matthew Taylor Report. Individuals can bring Employment Tribunal claims to challenge the status claimed by their employer and the subsequent ruling does, of course, have a knock-on effect on similarly situated individuals working for that employer. However we would suggest that a more efficient and effective way of dealing with is issue would be via the single enforcement body.

Question 11: What synergies, if any, are there between breaches in the areas of "core remit" and the other areas referenced above

We would agree that, for similar reasons to those in respect of the EHRC in our response to question 8 above, health and safety in the workplace is most efficiently left with the HSE.

We can, however, see good arguments for the enforcement of Working Time Regulations ("WTR") provisions residing with just one body. Given the range of rights contained within the WTR, we would suggest that enforcement could more effectively be carried out by a single enforcement body, including the aspects currently carried out by the HSE, since those do not so much depend on their expert assessment of health and safety of workers as on whether there has been compliance with the requirements of the WTR. It may well be that regulators in specific industry sectors could retain their existing role so as to ensure effective enforcement of aspects peculiar to those sectors, provided that there are strong links established between each and with the single enforcement body itself.

Question 12: Should enforcement focus on both compliance and deterrence?
Y/N, please explain your answer.
Yes. In our view, the goals of the consultation paper are most likely to be achieved if enforcement consists of compliance and deterrence. As recognised in the consultation paper, there is a spectrum of attitudes from employers (from "wanting to comply" to "having decided not to comply") and a variety of approaches to enforcement. It seems to us that, if the single enforcement body were to adopt the compliance approach without any deterrence, or vice versa, it would be hampered in seeking to achieve its goals.

Question 13: As a worker, where would go now for help if you had a problem with an employment relationship?
Acas, TU, CAB, GOV.UK, HMRC, EAS, GLAA, other, I wouldn't know where to go.

From our experience with clients, trade union members are most likely to seek help from their local official in the first instance while Acas is usually the first port of call for other workers.

Question 14: As a worker, how would you like to access help?
Through a single body, through a specialist body, through Acas, TU, CAB, GOV.UK, other.

N.A.

Question 15: As an employer, where would you go now for support on how to comply with employment law?
Acas, GOV.UK, HMRC, EAS, GLAA, Business Association, consultant, lawyer, other, I wouldn't know where to go.

Some clients turn to us as employment lawyers for support on compliance with employment law. Others will variously seek help from business or trade associations.

Question 16: As an employer, how would you like to access help?
Through a single body, through a specialist body, through Acas, TU, CAB, GOV.UK, other.

In our view a single enforcement body may well be viewed as a more user-friendly source of help, as opposed to having to consider which out of the number currently undertaking enforcement functions is the most appropriate. Much would depend, however, on the style and culture of the body. There are, in our experience, some regulators whose approach is such that an employer would not want to discuss sensitive matters, in case it provoked an

investigation or enforcement activity. By contrast, those who focus more on "prevention" than "cure" tend to be more trusted by those they regulate and produce better outcomes.

Question 17: Is there enough guidance and support available for workers/employers?
Y/N, how could it be improved.

A qualified no. The guidance and support available from Acas (in particular) is excellent given it is a free resource, although its resourcing is a cause for concern. However, the complex and multi-faceted nature of the rights and obligations for which the single enforcement body would be responsible, should not be understated. The most vulnerable workers often do not speak English as their first language and are, in many cases, we believe, unaware of where to look for guidance or support and/or due to the complex nature of employment law do not always understand how the law applies to their particular circumstances.

Even well-resourced employers struggle to comply with the laws in question (see for example, John Lewis' and Iceland Foods' recent difficulties with National Minimum Wage compliance, or the holiday pay claims against British Gas).

The key to success for the new single enforcement body will be in the style of communication and the effectiveness of the guidance and information provided, particularly for the most vulnerable workers about what their rights are and how they can enforce them.

Question 18: Should a new single enforcement body have a role in providing advice?

Yes. A central tenet of the Good Work Plan was to make sure workers are made aware of their rights. Therefore, it seems that a single enforcement body could provide advice, and that it will be well placed to do so. That said, there is the potential for a conflict between providing advice and enforcement. Perhaps, therefore, the single enforcement body could focus on providing comprehensive and clearly understood information and then signpost workers to advice providers; both gov.uk and Acas provide clear and helpful guidance to employers. Accordingly, consideration should be given as to what gaps there are in gov.uk and ACAS guidance. It will be confusing to employers and workers if there is not a clear delineation between the advisory efforts of gov.uk, ACAS and the single enforcement body.

Question 19: Would having a single enforcement body make it easier to raise a complaint?
Y/N, please explain your answer.

Yes, depending on how easy and well publicised the complaints process will be and how it is managed at the point of access.

The Employment Tribunals and the courts are under-resourced and not user-friendly for vulnerable workers. Our 2018 survey of our members produced the following responses:

- more than 75% of respondents are experiencing an increase in the time tribunals are taking to deal with the service of claims

- 90% of respondents are experiencing more delays in dealing with interim paper applications and other correspondence;

- 53% report delays in telephone calls being answered;

- 57% are experiencing delays in receiving reserved judgments; and

- 45% report postponements of a hearing due to a lack of judicial resources.

We conducted a further a survey of members which ran from 15 May and 3 June 2019. This survey revealed that:

- Over 66% of respondents experienced an increase in the time tribunals are taking to deal with the service of claims (this is down from 75% last year);

- 75% of respondents said that responses to wr itt en correspondence/applications are taking longer than a year ago.

- 51% of respondents report delays in telephone calls being answered (Slightly less than the 53% last year);

- Over 60% of respondents are experiencing delays in receiving Orders, and Judgments (including reserved judgments) (this is slightly up from last year);

- Over 63% of respondents said that urgent applications are taking longer than the previous year while 73% of respondents said that they also experience delays with all other applications ;

- Over 77% of respondents said that final hearings were being listed over a year after the issue of a claim; and

- A third of all respondents said that they had been involved in a case where the hearing was transferred to another tribunal centre (other than at the request of the parties); and 15% of respondents said that the hearing was transferred to another tribunal centre significantly far from the original location

The rules and procedures for raising Tribunal and court proceedings are complex and daunting. There are long delays from submission of an ET1 to a final hearing in some regions. Sanctions for failures to comply with CMOs and/or Judgments are not used/do not work. In some regions, Judges do not act quickly in respect of applications, unless they are to postpone a hearing; there are no dedicated case workers; and calls are left unanswered.

There are some areas in our view – for example under the WTR, minimum wage – where complaints could be capable of being made and resolved without the need for an adversarial forum. Resources need to be pooled and then perhaps the greatest impact the new body can have is to make raising a complaint easy, convenient and quick – and ensuring that workers are made aware of how they can raise a complaint – and there is then effective compliance.

Question 20: Would a single enforcement body improve the ability to identify the full spectrum of non-compliance, from minor breaches to forced labour?
Y/N, please explain your answer.

In theory, yes. Assuming that (i) labour market intelligence will be pooled and shared amongst the different functions of the new body and (ii) those responsible for investigating any breach will also make enquiries of the same employer to establish if there are obvious markers of other breaches/non-compliance.

Question 21: What sort of breaches should be considered 'lower harm'? Should these be dealt with through a compliance approach?

The single enforcement body must use its resources proportionately. However, we are concerned that apparent "low harm" infringements of, say, the NMW rules or holiday pay rules are infrequently challenged by workers. There are many barriers to enforcing workers' rights (see our answer to question 19 above). Therefore, employers can persistently breach such rights without real fear of punishment. In our view, the remit of the body should be to focus on prevention of breach through the availability of information and guidance to users and also the processes quoted in the consultation document used currently by HMRC and EAS but to take action to correct all detected breaches of the laws that will fall under its remit, other than perhaps where the breach results in no detriment to the worker.

Question 22: Which breaches should be publicised?
None, only prosecutions, more serious breaches above a specified threshold, all.

The manner in which the breaches are publicised may be relevant. If publication means a central record of all breaches, we think that this is appropriate. A "naming and shaming" approach could be used for more serious breaches but otherwise publicising all breaches seems to us disproportionate and care would be needed not to trivialise/normalise breaches such that the employers lose the fear of such publicity.

Question 23: Do the enforcement powers and sanctions currently available to the existing enforcement bodies provide the right range of tools to tackle the full spectrum of labour market non-compliance?

It would seem sensible to us that for each of the various non-compliance issues, any enforcement body should have a range of options open to them depending on:

- the seriousness of the breach;

- impact of the breach;

- the persistence of a breach; and

- repeated breaches.

However, the enforcement of employment law has, historically, mainly been a civil matter. While it may be appropriate for all breaches to have civil action/penalties attached to them, it may not be appropriate for all breaches to ultimately lead to criminal sanctions.

The nature of the potential penalty may also depend on the forum within which any action is commenced. For example, a serious breach of national minimum wage legislation could be brought to the Single Enforcement Body or to the Employment Tribunal. The Employment Tribunal would be able to make a civil award in favour of short-changed employees, but criminal penalties are not generally imposed. Given that criminal penalties can have significant implications for business in terms of lost business, reputational damage etc., it could be seen as being potentially inconsistent and unfair for the nature of the potential penalty to depend on the forum in which the wronged employee decides to bring action. To a certain extent this could be ameliorated by the Employment Tribunal having an obligation to refer certain breaches to the single enforcement body, but even in such cases, there is a risk of inconsistency of treatment between the enforcement regimes.

Any range of enforcement options would also have to take account of the different standards of proof typically associated with civil (balance of probabilities) and criminal (beyond reasonable doubt) cases.

Any fines which are awarded should be proportionate and fair and a single enforcement body may ensure that fines are awarded consistently. We would also suggest the expansion of the use of LMEU and LMEOs as other useful tools to encourage compliance without having to resort to fines or other criminal sanctions.

Question 24: Should civil penalties be introduced for the breaches under the gang masters licensing and employment agency standards regimes that result in wage arrears?

As noted above, it is our view that a range of options could be available to deal with such breaches. It could be regarded as being inconsistent for the nature of the enforcement action to depend on the forum or route to enforcement chosen by the relevant complainant. As well as an inconsistency of penalty, we would also be concerned that the differences between the criminal and civil standards of proof could also result in an inconsistency as to whether there was any outcome at all. A breach of wages obligations enforced via a civil route is, given the lower standard of proof required, more likely to lead to a result and redress for the affected workers than one taken via a criminal route and consequently may be more likely to result in companies complying with their obligations.

Question 25: If Y, do you agree with the proposed levels set out in the consultation? Y/N, if no, what level should these be set at?

We would not comment on the levels in detail, but, as is noted above, would suggest that consistency of potential outcomes across degrees of default rather than choice of enforcement route would, to us, seem desirable. If it is perceived that the current levels under NMW is effective there would appear to be little reason to adopt a different approach in relation to the areas of proposed extension.

Question 26: Should a single enforcement body have a role in enforcing section 54 of the Modern Slavery Act? Y/N, Please explain your answer.

Section 54 in its current form confers only a reporting obligation on the commercial organisations that are subject to this obligation. The extent of the substantive action they need to take is totally at the organisations' discretion. Accordingly, any enforcement of s 54, unless it confers specific requirements and obligations in relation to specific action, is unlikely to make any difference in relation to companies' actual performance of their obligations. We would suggest that stronger obligations are a precursor to having meaningful enforcement powers. The Secretary of State does have the power to bring injunction proceedings (as yet unused, so far as we are aware). This is a power which could be transferred to the single enforcement body, who may have the capacity to make it real option in their enforcement armory. The single enforcement body should also, however, provide valuable guidance on best practice and effective due diligence processes.

Substantive action anticipated by the government in connection with s 54 of the Modern Slavery Act described in the form of guidance only is reliant on "soft enforcement" via NGOs and concerned members of the public publicising perceived failings. However, neither NGOs nor concerned members of the public have any real rights of enquiry or any power to enforce other than via a publicity campaign, generating media interest, social media campaigns etc. In our experience, such action rarely gains any sort of traction (and therefore is a real concern to businesses) unless they are large, high profile businesses. Therefore, businesses that are unlikely to generate interest in the media or amongst the public at large have little incentive to embark on substantive human rights due diligence which would result in material which would then be published in the relevant modern slavery statements.

We are aware that some organisations and trade bodies have put significant amounts of work into human rights due diligence and modern slavery due diligence, in particular. As a result, a significant amount of "best practice" has been built up. We would suggest that stronger obligations are a precursor to having meaningful enforcement powers. The single enforcement body could, however, provide valuable guidance on best practice and effective due diligence processes. If the single enforcement body is not to be responsible for promoting such practice or guidance, it is important that the channels of communication are clear between the single enforcement body and any body responsible for guidance.

Question 27: Would introducing joint responsibility encourage the top of the supply chain to take an active role to tackle labour market breaches through the supply chain? Y/N, please explain your answer.

Subject to our answer to question 26, yes, we believe that introducing joint responsibility might encourage such behaviour. We note that the government consultation paper recognises various challenges to a potential joint responsibility. In addition, we would note the following:

- it may be difficult to determine which entity is at the "top" of the supply chain, particularly where the chain is long or where some of the "links" are not in the UK.

- a supplier may supply a number of "tops" of the supply chain, for example a large food manufacturer such as Kellogg's supplies all of the major supermarkets. There may be

concerns that if in the compliance phase, a number of "tops" co-operate or work together to encourage compliance by their suppliers, then this could give rise to competition law issues. We would suggest the clear guidance would be needed to avoid inadvertent breaches of competition law.

- some suppliers may be much larger and have considerably more resources than the entity at the "top" of the supply chain. To use the example above, as well as supplying large supermarket chains, Kellogg's also supply corner shops with two or three employees. We would suggest therefore that joint responsibility only applies to business over a certain size and/or where there is an equivalence of resources as between the supplier and the supplied.

- this may result in some businesses preferring non-UK suppliers, as they may view such a supply chain to be of lower risk to them than a UK one.

- while the "top" of the supply chain may benefit from lower costs, in a long supply chain, these benefits may be reaped by suppliers further down the chain who do not pass them on to those up the chain and those profiting the most from the breaches may be the "middle man".

- we suggest that using such an approach as an enforcement tool would be more effective if guidance is given to recipients of supplies on how best to ensure labour market compliance in supply chains.

- we would suggest that only some breaches of employment law have the potential to resonate up the supply chain – we would suggest that they be limited to breaches which affect a specified proportion of the relevant entities workforce and/or are above a financial impact threshold and/or indicate recidivism or a disregard for Employment Tribunal awards or recommendations and/or breaches of LMEOs (or equivalent).

- in order to encourage pro-active management of the supply chain without the possible perception of being treated unfairly as a result of another entities' poor practices, a "reasonable steps" defence to any form of joint responsibility might be considered. This may be a helpful consideration. In the same way that employers are protected from illegal working penalties, where they have carried out the correct document checks on their employees to obtain a 'statutory excuse' in the event the employee transpires to be working illegally, it may be appropriate to consider a similar approach whereby liability can be mitigated or avoided entirely where reasonable due diligence has been undertaken

Question 28: Do you think it would be fair and proportionate to publicly name a company for failure to rectify labour market breaches in a separate entity that it has no direct relationship with? Y/N, please explain your answer.

There are a number of practical legal difficulties for entities having joint responsibility alongside entities with whom they have no contractual relationship. If an entity is being asked to take on the risk of joint responsibility, then we would submit that it should have effective tools to manage that risk.

Clearly, the commercial threat of withdrawing business can be an effective tool, but by then, it may be too late. If an entity is to actively manage/carry out due diligence on/encourage

compliance in its supply chain, then, in addition to commercial pressure, we suggest that that entity would also need to have the right to receive information, to make enquiries and, if necessary, be able to enforce compliance or seek redress for failings which have an impact on them. Contractual provisions may also be used to demonstrate "reasonable steps" (if such an approach were adopted).

However, while this may be possible via the contractual arrangements, this would require a co-ordinated "pass through" of obligations between the contractual links in the supply chain. This may be overly complex and burdensome to administer, particularly in long supply chains and would, clearly, only ever be as strong as the weakest link. If one of the suppliers failed to perform its obligations, or fell out of the chain, those above and below would have no effective contractual rights to enforce. The Contracts (Rights of Third Parties) Act could be used to get around some of the problems of privity of contract, but of course can only confer a benefit and not impose an obligation on a third party, is of limited use. To be an effective tool in labour market enforcement, we would suggest that supply chain participants would have to be given statutory rights directly to be able to seek information and, potentially, seek redress from suppliers.

It may also be worth investigating whether a technological solution might be possible, particularly in providing an auditable trail of compliance across the whole supply chain for regulatory oversight and potentially, in time, smart regulation. Technology enablers could include block chain, smart contracts and AI. This may be possible in those areas where it is easy to prove a direct correlation between physical reality and the digital records, for example, wage payments. However, in other areas, it may be more difficult to verify information without third party intervention, such as certification and human inspections, which may become cumbersome and vulnerable to manipulation.

Technology solutions also have the potential to provide more cost effective means of record-keeping thus reducing the cost burden that is at risk of being passed down the supply chain and potentially creating further burdens for smaller businesses.

Ultimately, there is a limited amount a customer can do to ensure that its suppliers are legally compliant – particularly in the absence of contractual or statutory information and redress rights. As noted above, the government could consider either a "reasonable steps" obligation or defence as a means of balancing the desire for customers to take an active interest in maintaining an ethical supply chain with placing unfair burdens and responsibilities on business.

Question 29: Should joint responsibility apply to all labour market breaches enforced by the state? Y/N, please explain your answer.

We would note that to subject all employment law breaches to the joint responsibility regime could be potentially extremely burdensome for companies in and at the top of the supply chain. Most employers breach employment laws from time to time – whether deliberately or inadvertently and to be exposed to the double jeopardy of both civil liability in the employment tribunal as well as significant commercial pressure may be regarded as unfair. Should the company at the top of a supply chain be named and shamed if one of its suppliers were to dismiss a single employee unfairly or where it had inadvertently failed to pay the national

minimum wage as it had incorrectly calculated the number of hours worked by the employer. However, persistent breaches by that employer or deliberate breaches may be a different consideration. For the heads of supply chains to have to become involved in day-to-day or one-off breaches of employment law would require them to become involved in the minutiae of running another company's HR function which we believe would be undesirable. There are also likely to be significant GDPR challenges with employers sharing data about their employees with their customers and clients or end users. Ironically, in some respects the top of the supply chain would be subject to less enforcement and scrutiny as it would have no one above looking down on its activities.

Question 30: Would it be effective in all sectors? Y/N, if no, which, if any sectors would they be effective in?

We recognise that there is evidence that breaches are more prevalent in some sectors than others. While those sectors might be a focus for action, exempting sectors from enforcement could have the unintended consequence of allowing poor practices in unregulated sectors to flourish. There are many different sectors where issues may arise. The issue may be that there are more persistent breaches in some sectors which may lead to a consideration that the companies at the top of that supply chain should be more aware of the breaches in the labour market in their area.

Question 31: Do you think there should be a threshold for the head of supply chain having a responsibility for breaches at the top of the chain? Y/N, please explain your answer.

Where a supplier provides goods or services to a number of customers or clients we would note that:

- larger customers/clients are likely to have more leverage and influence than smaller ones; and

- having several customers/clients each trying to resolve an issue with a supplier could become confusing and unwieldy. This would be exacerbated if there were differing views amongst the customers/clients on how to approach rectification, which could become particularly fraught if those customers/clients were competitors.

We therefore suggest that some form of threshold both in terms of volume or percentage of business and to limit the number of "heads" may be helpful.

Question 32: Do you think embargoing of hot goods would act as an effective deterrent for labour market breaches? Y/N, please explain your answer.

Question 33: Would it be effective in all sectors? Y/N, if no, which, if any sectors would they be effective in?

Question 34: Should embargoing of hot goods apply to all labour market breaches enforced by the state? Y/N, please explain your answer.

Question 35: Are there other measures that the state could take to encourage heads of the supply chain to take a more active role in tackling labour market breaches?

Smart regulation may be in its infancy but provides potential to automate regulatory oversight, compliance and penalties for breach. It is being developed by a number of regulators across the globe to make regulatory oversight more efficient and incentivise remediation of breaches. This combined with automation and transparency of records through a digital solution can both strengthen and engender trust in the regulatory regime.

As in our response to question 28, technology solutions and smart regulation may also have the potential to reduce the cost burden of compliance which may be particularly welcome to smaller businesses.

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